

HOLLYWOOD VS. SILICON VALLEY: DeCSS DOWN, NAPSTER TO GO?*

Sarah H. McWane

As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.¹

Under the authority of Article I, Section 8 of the U.S. Constitution, Congress has continuously struggled with the task of molding our nation's copyright laws to adapt to rapid changes in technology.² Since Congress passed the first Copyright Act in 1909,³ laws have developed in response to innovations in radio, television and video without causing fatal damage to their respective industries

or markets.⁴ Businesses, although hesitant, have revamped long-standing business models in order to remain competitive.⁵ However, no enterprise has felt more threatened by technological advances than the entertainment industry.⁶ The music and film industries both have been reluctant to embrace new modes of distributing entertainment content.⁷ The recurring result has been for these industries to bring numerous lawsuits in the name of copyright protection trying to quell emerging technology.⁸ Digitization of copyrighted music and movies, the introduction of the Internet and the increasing popularity of peer-to-peer file sharing over the World Wide Web are no exception.⁹ The ease with which Internet users can copy and download digital files has put both the Motion Picture Association of America

* This article was written, and its analysis and conclusions based on the state of the law just prior to a Feb. 12, 2001 Ninth Circuit Court of Appeals decision. On Feb. 12, a three-judge Ninth Circuit panel decided that the scope of U.S. District Court Judge Marilyn Patel's preliminary injunction was "overbroad" and directed the district court to enter a modified preliminary injunction. *A&M Records, Inc. v. Napster, Inc.*, No. 00-16401/403, 2001 WL 115033, at *24 (9th Cir. Feb. 12, 2001). Although Napster is permitted to stay in business until such time, the Ninth Circuit agreed with the district court that the RIAA presented a prima facie case that Napster users committed direct copyright infringement. *Id.* at *8. However, Napster may also be held liable for contributory and vicarious copyright infringement, an issue to be more thoroughly developed at a full trial on the merits of the case. *Id.* at *13.

¹ *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984) (discussing the factors Congress must consider when enacting copyright laws). Congress must consider whether the legislation stimulates the producer so as to benefit the public and then determine whether the interest in the temporary monopoly would be outweighed by any benefit conferred on the public. *Id.* at 429 n.10.

² *Id.* at 428; U.S. CONST. art. I, § 8, cl. 8 (providing in part that "Congress shall have the Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

respective Writings and Discoveries").

³ Pub. L. No. 60-349, 35 Stat. 1075 (1909) (current version codified at 17 U.S.C. §§ 101-803 (1994 & Supp. V 1999)).

⁴ Wendy M. Pollack, Note, *Tuning In: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 *FORDHAM L. REV.* 2445 (2000) [hereinafter Pollack].

⁵ Michael S. Malone, *Let the Pirates Go*, *SILICON INSIDER*, at http://more.abcnews.go.com/sections/business/SiliconInsider/SiliconInsider_000627.html (June 27, 2000) (discussing the development and illegal uses of the cable television industry, and the inevitability of a digital black market).

⁶ James Lardner, *The Empire Strikes Back To Fight Pirates, the Entertainment Biz Deploys Technology as Well as Lawyers*, *U.S. NEWS & WORLD REP.*, Sept. 18, 2000, at 56, available at <http://www.usnews.com/usnews/issue/00918/digital.html> [hereinafter Lardner] (discussing the entertainment industries "ongoing legal war against pirates and freeloaders").

⁷ Charles L. Simmons, Jr., *Digital Distribution of Entertainment Content . . . The Battle Lines are Drawn*, 33 *MD. B.J.* 32 (2000) [hereinafter Simmons].

⁸ See Fred Moody, *Online Music Swapping Rocks: Tuning in to the Techno Beat*, at <http://more.abcnews.go.com/sections/tech/FredMoody/moody.html> (Sept. 2, 2000) (discussing the reluctance of the music industry to embrace technology due to greed).

⁹ Pollack, *supra* note 4, at 2445.

("MPAA")¹⁰ and the Recording Industry of Association of America ("RIAA")¹¹ at risk of potentially losing billions of dollars to hackers and pirates over the distribution of digital content.¹² On the other hand, websites and Internet Service Providers ("ISPs")¹³ that facilitate the distribution and downloading of music and videos over the Internet find themselves in the gray areas of copyright law.¹⁴ The ultimate effect of the threat of copyright lawsuits could stifle rising online ventures.¹⁵

Congress, in response to such tensions, passed the Digital Millennium Copyright Act of 1998 ("DMCA")¹⁶ "to insure that copyrighted content would continue to be protected by copyright law in the digital environment, but also sought the flexibility necessary to allow . . . Internet technolog[ies] and businesses to flourish while making copyright content available."¹⁷ The MPAA and the RIAA have recently tested the limits of the DMCA in two groundbreaking cases. The MPAA challenged the unauthorized copying and distribution of copyrighted movies on digital versatile disks ("DVD") over the Internet, and the RIAA contested the unauthorized downloading of compressed music files known as MP3s.¹⁸ The potential piracy problems result from the fact that CDs and MP3 files do not presently contain encryption technology to protect against the unauthorized copying of music content.¹⁹ While DVDs do con-

tain this technology, hackers have been able to easily discover the codes that descramble their security protection and subsequently post the decryption program on the Internet.²⁰ In *Universal City Studios, Inc. v. Reimerdes*,²¹ a federal district court judge enjoined a hacker website from the posting and linking of computer code used to descramble DVD encryption technology protection. On the other hand, the RIAA has not been as successful. In *A & M Records, Inc. v. Napster, Inc.*,²² a circuit court of appeals judge stayed the injunction ordered by the district court that would have shut down Napster, a company that facilitates the free transfer of MP3 music recording files over the Internet.²³

In looking at the history of our copyright law and the DMCA, this note will demonstrate that the district court decisions in both the *Reimerdes* and *Napster* test cases are simply temporary restraining walls against the unauthorized copying and distribution of copyrighted music and film content over the Internet.²⁴ Once these cases are decided, the entertainment industry must then determine whether or not they wish to catch up with technology and adjust the ways they do business.²⁵ Although the MPAA has a good chance of succeeding on appeal, the RIAA case is less clear because of the greater implications of legal peer-to-peer file swapping and our countries' goal of fostering revolutionary technologies over the In-

¹⁰ The eight major motion picture corporations in the association include Universal City Studios, Inc., Paramount Pictures Corp., Metro-Goldwyn-Mayer Studios, Inc., Tristar Pictures Inc., Columbia Pictures, Inc., Time Warner, Co., L.P., Disney Enterprises, Inc. and Twentieth Century Fox Film Corp. Simmons, *supra* note 7, at 32.

¹¹ The main members of the RIAA that control 92% of all music sold in the United States include, UMG Recordings, Inc., Sony Music Entertainment, Inc., Warner Bros. Records, Inc., Arista Records, Inc., Atlantic Recording Corp., BMG d/b/a The RCA Records Label, Capital Records, Inc., Elektra Entertainment Group, Inc., Interscope Records and Sire Records Group, Inc. *Id.*

¹² Benton J. Gaffney, *Copyright Statutes that Regulate Technology: A Comparative Analysis of The Audio Home Recording Act and the Digital Millennium Copyright Act*, 75 WASH. L. REV. 611, 629 (2000) [hereinafter Gaffney] (arguing that "the ease of copying and distributing digital works also encourages unauthorized sharing of copyrighted works among private individuals").

¹³ For the purpose of this article Internet Service Provider shall be referred to as "ISP." An ISP is defined by The Digital Millennium Copyright Act as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modifi-

cation to the content of the material as sent or received." 17 U.S.C. § 512(k)(1)(A) (1994 & Supp. V 1999).

¹⁴ David Segal, *MP3.com Loses Court Ruling*, THE WASHINGTON POST, Sept. 7, 2000, at A1 [hereinafter Segal].

¹⁵ *Id.*

¹⁶ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. § 512 and in various sections of Chapter 12 of Title 17 of the U.S.C.).

¹⁷ *The Future of Digital Music: Is There an Upside to Downloading? Before the Senate Judiciary Comm.*, 106th Cong., at http://www.senate.gov/~judiciary/7112000_ogh.htm (2000) (testimony of Senator Orin G. Hatch) [hereinafter *Hearings*].

¹⁸ Simmons, *supra* note 7, at 32.

¹⁹ *Id.* at 33.

²⁰ *Id.*

²¹ 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

²² Nos. 00-16401 and 00-16403, 2000 WL 1055915 (9th Cir. July 28, 2000).

²³ *Id.*

²⁴ Simmons, *supra* note 7, at 37.

²⁵ *Id.*; Kimberly D. Richard, *The Music Industry and its Digital Future: Introducing MP3 Technology*, 40 IDEA: J.L. & TECH. 426, 430 (2000) ("Court decisions affecting music distribution could certainly pave the way for the digital distribution of videos and movies, among other things, once the technology has sufficiently evolved.").

ternet.²⁶ Regardless of the entertainment industries' success or failure, it will inevitably be up to the RIAA and the MPAA to adapt their models of distributing copyrighted content to work with the Internet, not against it.

This note examines the copyright debate over the distribution of digital entertainment content over the Internet and the recent trend of judicial decisions that strengthen the law in favor of copyright holders. First, this note discusses the reproduction of music and video content and the introduction of digital technology. Part II illustrates the background of copyright law, the theories of copyright infringement and the fair use affirmative defense to infringement. Part III explores the ways in which the DMCA has strengthened copyright law, and how it effects the entertainment industry and ISPs. Part IV of this note recounts the district court's opinion in the *Reimerdes* case under Title I of the DMCA and the district court's opinion in the *Napster* case under Title II of the DMCA. Part V assesses the district court's decision to preliminarily enjoin Napster from facilitating the free transfer of MP3 files over the Internet and the effect it could have on other file-sharing technologies. Utilizing the aforementioned discussions, this note concludes with an analysis of the implications of the *Reimerdes* and *Napster* decisions on the future of copyright law, and the unauthorized copying and distribution of digital entertainment content in cyberspace.

I. REPRODUCTION OF MUSIC AND VIDEO CONTENT AND THE INTRODUCTION OF DIGITAL TECHNOLOGY

The digitization of music and film content from its previous analog²⁷ format has revolutionized

the way the entertainment industry distributes their copyrighted products to consumers.²⁸ The digital medium is now the standard for releasing new and existing content.²⁹ As the unauthorized reproduction of analog audiocassettes and videocassettes posed a threat to the entertainment industry in the 1980s, the new digital formats create similar concerns.³⁰

A. The Sony Betamax Video Tape Recorder ("VTR") and the Emergence of DVDs

The initial threat to the entertainment industry over the unauthorized copying of video content arose in *Sony Corp. of America v. Universal City Studios*.³¹ In *Sony*, the U.S. Supreme Court held that the sale of the Sony VTR for home taping and later private viewing of copyrighted television broadcasts constituted a "fair use."³² Because copyright holders do not possess exclusive rights to their works; individuals may reproduce copyrighted works without permission if it is done so in a fair or reasonable manner.³³ The Court further held that "a manufacturer is not liable for the sale of a 'staple article of commerce' that is 'capable of commercially significant [or substantial] noninfringing uses.'"³⁴ *Sony* is the landmark case that ultimately laid out what is now known as the common law fair use and staple article of commerce doctrines, both of which are affirmative defenses to copyright infringement imposing the burden of proof on the defendant infringer.³⁵

Approximately fifteen years after the *Sony* decision, in the mid-1990s, the digitization of video content from their original videocassette tapes emerged on the market.³⁶ The film industry currently distributes most of their copyrighted movies in digital format on DVDs, which can be

²⁶ *Hearings*, *supra* note 17 (testimony of Senator Orin G. Hatch).

²⁷ "Analog" is generally defined as "designating or of electronic, recordings, etc. in which the signal corresponds to a physical change, as sound to a groove in a phonograph record." Elizabeth R. Grosse, *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.: The RIAA Could Not Stop the Rio—MP3 Files and The Audio Home Recording Act*, 34 U.S.F. L. REV. 575, 577 n.18 (2000) [hereinafter Grosse] (citing WEBSTER'S NEW WORLD DICTIONARY 385 (3d. ed. 1994)) (noting that examples of analog recordings include audio cassette tapes and video cassette tapes).

²⁸ Simmons, *supra* note 7, at 33.

²⁹ *Id.*

³⁰ Gaffney, *supra* note 12, at 630 n.129 (reasoning, how-

ever, that just as the movie industry's fears that VCRs would "eliminate the demand for movies in theaters" proved unfounded, "it may turn out that fears of digital technology . . . may also prove unfounded").

³¹ 464 U.S. at 417.

³² *Id.* at 442.

³³ *Id.*

³⁴ *Id.*

³⁵ Ariel Berschadsky, *RIAA v. Napster: A Window Onto the Future of Copyright Law in the Internet Age*, 18 J. MARSHALL J. COMPUTER & INFO. L. 755, 764 (2000) [hereinafter Berschadsky]; see also Pollack, *supra* note 4, at 2459 (discussing the fair use affirmative defense to online copyright infringement).

³⁶ Simmons, *supra* note 7, at 32 (discussing digital video technology).

played and viewed on home DVD players³⁷ and computer hard drives.³⁸ An encryption-based system, known as Content Scrambling System ("CSS"), protects these motion pictures from being decrypted, and copied or viewed on non-CSS-licensed DVD players.³⁹ The digital sound and graphic files that are encrypted on CSS-protected DVDs can only be decrypted by an "appropriate decryption algorithm that employs a series of keys stored on the DVD and DVD players."⁴⁰ Consequently, only CSS-protected players and drives containing the appropriate keys can decrypt and play the secured DVD files.⁴¹ Manufacturers of compliant DVD playing devices are given licenses, subject to an administrative fee, on a royalty-free basis.⁴² Although DVDs can be copied without degradation from generation to generation, the unauthorized copying and distribution of DVDs tends to pose less of a threat to the film industry than did the Sony VTR because DVDs do not contain sophisticated compression technology.⁴³ Thus, the digital transfer of full-length feature films takes up large amounts of hard drive space, and copying is less feasible due to huge download and transfer times.⁴⁴

B. Compact Disks ("CDs"), The Digital Audio Tape ("DAT") and MP3s

Like the film industry, one of the most significant advances for the recording industry has been the digitization of music content.⁴⁵ The CD was the first commercially successful digital medium, providing consumers with a much clearer sound than the older analog technology.⁴⁶ Unlike DVDs, CDs have never been encrypted with technology

to protect against the unauthorized copying and distribution of copyrighted music.⁴⁷ Initially, copying digitally copyrighted music to cassette tapes, using analog recording devices, produced lower sound quality that deteriorated after each successive reproduction.⁴⁸ In the early 1980s, a few years after CDs were introduced, the DAT recorder became commercially available to consumers.⁴⁹ The recording industry was concerned with DAT recordings because, unlike the inferior analog quality copies, the DAT created perfect copies of copyrighted music.⁵⁰

An even greater threat to copyright protection in the recording industry is the more recent introduction of the MPEG-1 Audio Layer 3 or MP3.⁵¹ MP3 is a digital compression technology that allows audio recordings to be compressed into files that can easily be downloaded on personal computers or transferred over the Internet.⁵² Compressed MP3 files are attractive because, as opposed to the transfer of DVDs, they use little memory, and require little download or transfer time.⁵³ As with DVD files transferred over the Internet, MP3 files retain CD-quality sound.⁵⁴ Users can upload CDs to their computers by using "ripping" software, which makes it possible to encode them into MP3 format and then transfer the files over the Internet.⁵⁵ Users also can quickly download already compressed MP3 files from the Internet onto their computer hard drives or "burn" them onto CDs.⁵⁶ The problem remains that a majority of MP3 files were never authorized by their owners to be available in digital format over the Internet.⁵⁷ Like CDs, MP3s do not contain copyright management information. Thus, there is no protection from the free unauthorized

³⁷ DVD players are the functional equivalent to VCRs that play analog videocassette tapes, but DVD players are used to play DVDs viewed on television screens. *See, e.g., Reimerdes*, 111 F. Supp. 2d at 310.

³⁸ DVDs, also known as CD-ROMs, are five-inch wide optical disks that can also be read and played on a computer's five-inch wide CD-ROM drive and viewed on computer screens. *See id.* at 307, 310.

³⁹ *Id.* at 308 (explaining the development of CSS).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Simmons*, *supra* note 7, at 33; *see also Reimerdes*, 111 F. Supp. 2d at 308.

⁴⁴ *Simmons*, *supra* note 7, at 33.

⁴⁵ *Id.* at 32.

⁴⁶ *Id.* (discussing that like DVDs, CDs can be copied with-

out degradation from each generation).

⁴⁷ *Id.* at 33.

⁴⁸ *Grosse*, *supra* note 27, at 578 (discussing digital and analog recording devices).

⁴⁹ *Id.*

⁵⁰ *Id.* at 578-79.

⁵¹ *Pollack*, *supra* note 4, at 2449.

⁵² *Id.* (discussing MP3 technology).

⁵³ *Id.* at 2450.

⁵⁴ *Id.* at 2449.

⁵⁵ *A&M Recordings, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000) (discussing MP3 technology).

⁵⁶ *See id.* "Burning" refers to the process by which music files from a computer hard drive are encoded onto CDs. *See id.*

⁵⁷ *Grosse*, *supra* note 27, at 581 (discussing the piracy problem).

use, copying or distribution of the recordings.⁵⁸ Despite its enormous potential for copyright infringement, the MP3 format is quickly becoming the standard for the digital distribution of music.⁵⁹

C. The Audio Home Recording Act of 1992 ("AHRA")⁶⁰ and the *Diamond Multimedia*⁶¹ Decision

With the advent of DVDs and MP3s, the entertainment industry felt threatened by these new methods by which people could make perfect copies of video and music recordings.⁶² In October 1992, reacting to the *Sony* decision and the arrival of the DAT recorder in the home consumer market, Congress enacted the AHRA.⁶³ The AHRA was designed to protect consumers from copyright infringement liability for private, non-commercial taping of copyrighted audio or video recordings while at the same time also protecting copyright owners from piracy.⁶⁴ The AHRA accomplishes this goal by requiring anyone who manufactures, imports or distributes a digital recording device to pay a royalty that goes into a general fund that is distributed to copyright owners to make up for lost revenues.⁶⁵ Such recording devices also are required to implement a Serial Copyright Management System ("SCMS"), an encoding technology that prevents the device's ability to create copies of any works it records (i.e., making copies of a copy).⁶⁶

The AHRA was tested in June 1999 when the RIAA sued to enjoin Diamond Multimedia Systems, Inc. from manufacturing and distributing its Rio Player in *Recording Industry Ass'n of America v. Diamond Multimedia Sys., Inc.*⁶⁷ The Rio player allows users to download MP3 files from a computer hard drive and store them on a memory card.⁶⁸

The files on the memory card can then be stored on a portable device, and played and listened to using headphones.⁶⁹ In this case, the Ninth Circuit Court of Appeals held that the AHRA did not cover the Rio player and that personal computers and MP3 files were exempted from regulation under the AHRA.⁷⁰ The court further found that the Rio did not qualify as a "digital audio recording device" because it only downloads MP3 files from computer hard drives, and a hard drive is neither a "digital music recording" nor a transmission thereof.⁷¹ Thus, Rio players were not capable of creating "digital audio copied recording[s]" within the meaning of the AHRA.⁷² The *Diamond Multimedia* suit was ultimately settled out of court on undisclosed terms.⁷³ Yet, even if the Ninth Circuit had found that the AHRA applied to the Rio, because MP3 files do not contain copyright management information, SCMS would have done little to stop the unauthorized copying of music recordings.⁷⁴

As a result of the challenges of digital technology, the Secure Digital Music Initiative ("SDMI") forum was launched in December of 1998 "to bring together interested parties to develop technology specifications for protecting the distribution of digital media."⁷⁵ The forum's goal was to create a single standard and clear rules for developing secure copyright technology that would be incorporated into new digital playback devices and programs.⁷⁶ The first phase of SDMI, set to come out no earlier than the end of 2000, covers both the sale and manufacturing of SDMI-compliant portable digital music players, which also would be allowed to play unencrypted, non-SDMI-compliant, files.⁷⁷ The second phase of SDMI consists of issuing encryption technology and watermarking⁷⁸ of SDMI-compliant music that can only be played or copied on SDMI-compliant

⁵⁸ *Id.* at 582.

⁵⁹ Simmons, *supra* note 7, at 33.

⁶⁰ Pub. L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001-1010 (1992)).

⁶¹ *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999).

⁶² Rebecca J. Hill, *Pirates of the 21st Century: The Threat and Promise of Digital Audio Technology on the Internet*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 311, 324-25 (2000) [hereinafter Hill].

⁶³ 17 U.S.C. §§ 1001-1010; *see also* Hill, *supra* note 62, at 324-25.

⁶⁴ Grosse, *supra* note 27, at 580 (discussing the layout of the AHRA).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 180 F.3d at 1073.

⁶⁸ Grosse, *supra* note 27, at 581 (describing Rio technology and how it works).

⁶⁹ *Id.*

⁷⁰ *Diamond Multimedia*, 180 F.3d at 1081.

⁷¹ *Id.* at 1076-78.

⁷² Grosse, *supra* note 27, at 586.

⁷³ Simmons, *supra* note 7, at 34.

⁷⁴ Grosse, *supra* note 27, at 597.

⁷⁵ *Napster*, 114 F. Supp. 2d at 926 n.31.

⁷⁶ Grosse, *supra* note 27, at 597-98 (discussing the solutions to the MP3 piracy problem).

⁷⁷ *Id.*; *see also Napster*, 114 F. Supp. 2d at 926 n.31.

⁷⁸ *Napster*, 114 F. Supp. 2d at 926 n.31 ("Watermarking

devices.⁷⁹ Although encryption technology will not affect existing CDs and MP3 files, encrypted CDs and digital files will not work on existing CD or software players.⁸⁰ Consumers will either have to purchase new SDMI-compliant CD players or upgrade their computer software in order to listen to, copy or download encrypted music.⁸¹ The strictness with which SDMI presents to consumers in their ability to gain access to copyrighted music demands a look back at the original purpose of our copyright laws.

II. COPYRIGHT LAW THAT AFFECTS THE ENTERTAINMENT INDUSTRY AND ISPS IN CYBERSPACE

A. The Background of the United States Copyright Law

The need for copyright protection first emerged in the colonial period as a response to British censorship laws and the invention of the printing press.⁸² Since the earliest days of our nation, copyright law has sought to balance the need for freedom of expression with the desire to encourage technological improvements.⁸³ Today, the Copyright Act of 1976⁸⁴ (the "Copyright Act" or the "1976 Copyright Act") states that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed."⁸⁵ Generally, film and music copyrights are shared between joint authors consisting of the actual musical artist or actor herself, and the music or film producers.⁸⁶ Recording artists and RIAA members are compensated for their creative work from the

sale of phone records and license fees.⁸⁷ In the case of actors and the MPAA, compensation comes from the sale and rental of videos, movie ticket sales and license fees.⁸⁸ Profits from the sale, distribution and reproduction of the works are the primary motivating factor for artists to make worthwhile their initial monetary and artistic investments in their respective industries.⁸⁹

B. Traditional Theories of Copyright Infringement: Direct, Contributory and Vicarious Liability

Under the 1976 Copyright Act, copyright holders are granted exclusive rights and are authorized to reproduce, prepare derivative works, distribute copies, display and perform copyrighted work publicly.⁹⁰ Copyright infringement occurs if any of these exclusive rights are violated.⁹¹

1. Direct Copyright Liability

A direct copyright infringer can be held directly liable for actual physical infringement of a copyright holder's works.⁹² Direct infringement occurs if the copyright owner can prove: "(1) valid copyright ownership of a work; (2) the work was, in fact, copied; and (3) the copying of work was illegal under copyright laws."⁹³ The direct infringer's intent or knowledge is not an element that needs to be proven under the Copyright Act.⁹⁴ A copyright owner can obtain both monetary damages and injunctive relief as a result of the infringer's absolute liability.⁹⁵

In *UMG Recordings, v. MP3.com, Inc.*,⁹⁶ the de-

imbeds 'bits' or inaudible marks on content media; future SDMI-compliant devices or software players will be able to read the presence or absence of those bits and control copying accordingly.")

⁷⁹ Grosse, *supra* note 27, at 598.

⁸⁰ *Napster*, 114 F. Supp. 2d at 926 n.31.

⁸¹ *Id.*

⁸² *Sony*, 464 U.S. at 430 n.12.

⁸³ *Id.*

⁸⁴ Pub. L. No. 94-553, 90 Stat. 2541-26012 (codified at 17 U.S.C. §§ 101-1101 (1994 & Supp. V 1999)).

⁸⁵ 17 U.S.C. § 102(a) (1994 & Supp. V 1999).

⁸⁶ Pollack, *supra* note 4, at 2453.

⁸⁷ Berschadsky, *supra* note 35, at 762.

⁸⁸ John Jackson, *Royalty Securitization: Taking Cabs to Bankruptcy Court*, 21 T. JEFFERSON L. REV. 209, 212 (2000) (discussing the cash flow assets that are available in the entertainment industry).

⁸⁹ Berschadsky, *supra* note 35, at 762; see also Naomi Abe

Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1241 (1997) [hereinafter Voegtli] (discussing the incentive factors that drive the entertainment industry).

⁹⁰ Berschadsky, *supra* note 35, at 764 (outlining the framework of the Copyright Act); 17 U.S.C. § 106 (1994 & Supp. V 1999).

⁹¹ Jennifer E. Markiewicz, Comment, *Seeking Shelter from the MP3 Storm: How Far Does the Digital Millennium Copyright Act Online Service Provider Liability Limitation Reach?*, 7 COMMLAW CONSPECTUS 423, 426 (1999) [hereinafter Markiewicz].

⁹² *Id.* at 426.

⁹³ *Id.* at 427 (citing MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW § 9.20 (2d ed. 1995)).

⁹⁴ *Id.*

⁹⁵ Berschadsky, *supra* note 35, at 764.

⁹⁶ 92 F. Supp. 2d 349 (S.D.N.Y. 2000) (discussing direct liability as applied to online copyright infringement). The RIAA filed the lawsuit against MP3.com on behalf of Universal Music Group and four other major RIAA members. While

fendant MP3.com faces the largest fine ever imposed in a direct copyright infringement case if not overturned on appeal.⁹⁷ In that case, MP3.com purchased and copied thousands of plaintiff RIAA's CDs and stored them on its servers.⁹⁸ Part of MP3.com's service, called "My.MP3.Com," allowed users to log on and once they "proved"⁹⁹ that they owned an original copy of a recording in the defendant's database, the user could access the music over the Internet from any computer without having to insert the original disk.¹⁰⁰ The district court judge found that defendant MP3.com's "replaying for the subscribers converted versions of the recordings it copied, without authorization from plaintiff's copyrighted CDs," was a presumptive case for direct liability under the Copyright Act.¹⁰¹ The judge later ruled that MP3.com "willfully" violated copyright law and ordered defendant to pay \$25,000 per CD to RIAA for a total penalty of roughly \$118 million.¹⁰² The primary purpose of the lawsuit was to send a very poignant message to other music-sharing Internet services tempted to break copyright law by offering free copies of copyrighted works over the Internet.¹⁰³

2. Contributory and Vicarious Copyright Liability

Third parties, such as ISPs, who do not actually commit copyright infringement themselves can be held indirectly liable for the copyright infringement of their users through theories of contributory or vicarious liability.¹⁰⁴ Although these theories of liability for copyright infringement are not

addressed in the Copyright Act, courts have long recognized the need for contributory and vicarious copyright infringement liability.¹⁰⁵ In order to prevail on either of these two theories, a copyright holder must first prove direct copyright infringement by a third party.¹⁰⁶ Defendants can be held liable for contributory copyright infringement if the copyright owner proves that: "(1) a direct infringement occurred[;] (2) the defendant knew or had reason to know of the infringing activity[;] and (3) the defendant substantially participated in the infringement by inducing, causing, or materially contributing to its occurrence."¹⁰⁷ A defendant also can be held vicariously liable even if he or she has no direct knowledge of the infringing activity.¹⁰⁸ The plaintiff need only prove that the defendant has "the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."¹⁰⁹ Both monetary damages and injunctive relief may be sought for contributory and vicarious theories of liability.¹¹⁰

C. Affirmative Defense of Fair Use

The *Sony* fair use doctrine is now codified in Section 107 of the Copyright Act¹¹¹ and provides the following nonexclusive factors considered in deciding a copyright infringement case:¹¹²

- (1) The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

the other four labels settled out of court for an undisclosed amount, Universal remained the sole plaintiff in the litigation. See Segal, *supra* note 14, at A1.

⁹⁷ See Segal, *supra* note 14, at A1.

⁹⁸ *MP3.com*, 92 F. Supp. 2d at 350.

⁹⁹ A subscriber can "'prove' that he already owns the CD version of the recording by inserting his copy of the commercial CD into his computer CD-ROM drive for a few seconds . . . or [the subscriber] must purchase the CD from one of defendant's cooperating online retailers." *MP3.com*, 92 F. Supp. 2d at 350.

¹⁰⁰ Segal, *supra* note 14, at A1.

¹⁰¹ *MP3.com*, 92 F. Supp. 2d at 350.

¹⁰² *UMG Recordings v. MP3.com, Inc.*, No. 00 Civ. 472 (JSR), 2000 WL 1262568, at *4 (S.D.N.Y. Sept. 6, 2000) (holding that the statutory damage award could be "more or less depending on the number of qualifying CDs determined at the final phase of the trial" and merely relied on defendants' approximation of 4,700 CDs copied of plaintiff's copyrighted works).

¹⁰³ *Id.*

¹⁰⁴ Markiewicz, *supra* note 91, at 427.

¹⁰⁵ *Id.* (discussing theories of contributory and vicarious liability).

¹⁰⁶ *Napster*, 114 F. Supp. 2d at 911.

¹⁰⁷ Pollack, *supra* note 4, at 2456.

¹⁰⁸ *Id.*

¹⁰⁹ *E.g.*, *Fonovisa v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996) (holding swap meet operator vicariously liable for the activities of vendors who sold copyrighted music recordings). The operators were held vicariously liable because they had the right to terminate the vendors at will, and they had a financial interest based on swap meet admission fees and concession stand sales generated from swap meet customers. *Id.*

¹¹⁰ Berschadsky, *supra* note 35, at 765-66.

¹¹¹ 17 U.S.C. § 107 (1994).

¹¹² Pollack, *supra* note 4, at 2459 (laying out the framework for the fair use defense). Recall that this doctrine allows individuals to reproduce copyrighted works without permission if it is done so in a fair or reasonable manner. See *Sony*, 464 U.S. at 442.

- (4) The effect of the use upon the potential market for or value of the copyrighted work.¹¹³

The fair use affirmative defense is applied flexibly on a case-by-case basis.¹¹⁴ All of the factors are considered together in deciding whether a defendant violated copyright law.¹¹⁵ Generally, the doctrine allows a third party to copy or use a copyrighted work without the consent of the owner if it is done in a fair or reasonable manner.¹¹⁶

III. THE DIGITAL MILLENNIUM COPYRIGHT ACT

A. Background

Before the DMCA was enacted in 1998, ISPs were sued frequently for contributory infringement based on the direct copyright infringement of their users due to the difficulty of identifying single copyright infringers.¹¹⁷ In December 1996, two treaties were adopted from the World Intellectual Property Organization ("WIPO") conferences held in Geneva, the WIPO Copyright Treaty¹¹⁸ and the WIPO Performances and Phonograms Treaty.¹¹⁹ These treaties were designed to provide contracting nations, including the United States, with effective legal protection for authors of copyrighted works from digital piracy over the Internet.¹²⁰ As a result of the WIPO, Congress enacted the DMCA.¹²¹ Title I of the DMCA implements the two WIPO treaties and prevents the circumvention of technological measures protecting copyrighted works.¹²² Title II of the DMCA, or the Online Copyright Infringement Liability Limitation Act, creates a safe harbor and limits liability for ISPs from the unauthorized copyright infringement by their users.¹²³

B. Title I of the DMCA

Title I of the DMCA adds a new Chapter 12 to Title 17 of the U.S. Code.¹²⁴ Section 1201 of the Copyright Act is known as the anti-circumvention provision.¹²⁵ Section 1201(a)(1) prohibits the act of circumventing a technological protection measure that controls access to a digital copyrighted work.¹²⁶ Section 1201(a)(2) prohibits "creating and making available certain technologies . . . developed or advertised to defeat technological protections against unauthorized access to a work."¹²⁷ This section further provides that "no person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology"¹²⁸ that (1) is designed primarily to circumvent technology that protects copyrighted works, (2) has limited commercially significant uses other than circumvention, or (3) is purposely marketed for circumvention.¹²⁹ The exceptions to this section apply to reverse engineering, encryption research, protection of personal identifying information, security testing, certain analog devices and other government activities, as well as to use by educational institutions and law enforcement.¹³⁰

C. Title II of the DMCA: The Online Copyright Infringement Liability Limitation Act

In 1998, Congress added Section 512 to Title 17 of the U.S. Code and incorporated it as Title II of the DMCA, or The Online Copyright Infringement Liability Limitation Act of the DMCA.¹³¹ Title II creates a safe harbor and limits the liability of ISPs from copyright infringement that may pass

¹¹³ 17 U.S.C. § 107 [hereinafter fair use factors].

¹¹⁴ Pollack, *supra* note 4, at 2459.

¹¹⁵ *Id.*

¹¹⁶ Hill, *supra* note 62, at 323.

¹¹⁷ Pollack, *supra* note 4, at 2456.

¹¹⁸ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65.

¹¹⁹ World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76.

¹²⁰ *Reimerdes*, 111 F. Supp. 2d at 315-16 (discussing the background of the DMCA).

¹²¹ *Id.*

¹²² 17 U.S.C. § 1201-1205 (Supp. IV 1998).

¹²³ Online Copyright Infringement Liability Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 U.S.C. § 512 (Supp. IV 1998)).

¹²⁴ Brian Socolow and James R. Guerette, *Digital Millennium Copyright Act Interpreted*, N.Y. L.J., July 24, 2000, at s7 (col.1) [hereinafter Socolow] (discussing the framework of Title I of the DMCA); *see also* 17 U.S.C. §§ 1201-1205.

¹²⁵ Socolow, *supra* note 124; 17 U.S.C. §§ 1201-1205.

¹²⁶ 17 U.S.C. § 1201(a)(1)(A) (Supp. IV 1998). This section prohibits "actual" circumvention and takes effect Oct. 28, 2000. *See* Pollack, *supra* note 4, at 2464.

¹²⁷ *Reimerdes*, 111 F. Supp. 2d at 316 (citing H.R. REP. No. 105-551(I), at 18 (1998)); 17 U.S.C. § 1201(a)(2).

¹²⁸ 17 U.S.C. § 1201(a)(2).

¹²⁹ Pollack, *supra* note 4, at 2463 (discussing the Title I anti-circumvention provision); *see also* 17 U.S.C. § 1201(a)(2)(A)-(C).

¹³⁰ 17 U.S.C. § 1201(d)-(k).

¹³¹ 17 U.S.C. § 512.

through their networks.¹³² Title II targets actual Internet users who violate copyright law by either downloading or uploading the infringing material without an artist's permission.¹³³ Under this title of the DMCA, an ISP can avoid being shut down by court order for copyright infringement and can escape liability for money damages even if they are found vicariously or contributorily liable for copyright infringement.¹³⁴ However, individual subscribers who commit infringing activity can be restrained by court order from accessing the service provider.¹³⁵

The safe harbor provision of Title II limits the liability of an ISP in four distinct situations.¹³⁶ First, Section 512(a) on transitory digital network communications, applies to a service provider "transmitting, routing, or providing connections, for material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections[.]"¹³⁷ A qualifying ISP under this section must meet five additional conditions.¹³⁸ Essentially, under this section, an ISP must be merely a passive data "conduit" for the infringing material being transferred through the ISP's network.¹³⁹ The second limitation on liability, found in Section 512(b), applies to system caching.¹⁴⁰ This section applies to intermediate or temporary storage of Internet material on an ISP's server that may be infringing.¹⁴¹ In order for an ISP to avail itself of this safe harbor found in Section 512(b), the ISP must not select, modify or otherwise interfere with the information being stored temporarily on its servers by a copyright infringer.¹⁴²

The third safe harbor provision, Section 512(c), limits the liability of an ISP for information residing on systems or networks at the direction of users.¹⁴³ This section applies as long as the ISP does not have actual knowledge of or is aware of facts and circumstances of the infringing activity, and does not benefit financially from storing infringing material on its system or network.¹⁴⁴ Once an ISP is made aware of a user's alleged copyright infringement, the ISP must act "expeditiously to remove or disable access to[] the material that is claimed to be infringing."¹⁴⁵ The last section pertaining to ISP copyright liability, Section 512(d), applies to information location tools.¹⁴⁶ As long as the same conditions found in 512(c) are met, an ISP will not be held liable under Section 512(d) for money damages or for injunctive sanctions for referring or linking to Internet locations that contain infringing material by way of hyperlinks, online directories, search engines or any other information location tools.¹⁴⁷ An important part of Title II is Section 512(n), which states that subsections (a) and (b) describe separate and distinct functions, and that the question of whether an ISP qualifies for a limitation on liability is based solely on the criteria of those subsections and does not affect an ISP's potential liability under another subsection of the DMCA.¹⁴⁸

Finally, in order for an ISP to avail itself of the safe harbor provisions of Section 512, an ISP must "adopt and reasonably implement a policy that provides for the termination of repeat infringers from the system or network[,] and that accommodates and does not interfere with standard copyright protection measures in connection with its system or network."¹⁴⁹ The ISP must also register

¹³² Berschadsky, *supra* note 35, at 767.

¹³³ Pollack, *supra* note 4, at 2466.

¹³⁴ Berschadsky, *supra* note 35, at 767.

¹³⁵ 17 U.S.C. § 512(j)(B)(i).

¹³⁶ Pollack, *supra* note 4, at 2465 (laying out the framework for the Title II safe harbor provision).

¹³⁷ 17 U.S.C. § 512(a).

¹³⁸ 17 U.S.C. § 512(a)(1)–(5). Section 512(a) applies if:

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;
- (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;
- (4) no copy of the material made by the service pro-

vider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients . . . ; and

- (5) the material is transmitted through the system or network without modification of its content.

Id.

¹³⁹ Pollack, *supra* note 4, at 2465.

¹⁴⁰ 17 U.S.C. § 512(b).

¹⁴¹ Pollack, *supra* note 4, at 2465.

¹⁴² *Id.*

¹⁴³ 17 U.S.C. § 512(c).

¹⁴⁴ *Id.* at § 512(c).

¹⁴⁵ 17 U.S.C. § 512(c)(1)(C).

¹⁴⁶ 17 U.S.C. § 512(d).

¹⁴⁷ *Id.* at § 512(d); *see also* Pollack, *supra* note 4, at 2466.

¹⁴⁸ 17 U.S.C. § 512(n).

¹⁴⁹ Socolow, *supra* note 124, at s7; *see* 17 U.S.C. § 512(i).

a designated agent with the U.S. Copyright Office to receive notifications of claimed copyright infringement by individual users.¹⁵⁰ If an ISP does not meet the safe harbor provision of Title II of the DMCA, a court may issue a preliminary injunction if the complaining party can show probable success on the merits and the possibility of irreparable harm, or that the financial burden to the ISP is outweighed by the harm imposed on the copyright holder if no action is taken.¹⁵¹

IV. THE MPAA AND RIAA PUT THE DMCA TO THE TEST

A. Title I of the DMCA: The Background of *Universal Studios, Inc. v. Reimerdes*

In September 1999, a 15-year-old Norwegian named Jon Lech Johansen and two unnamed individuals he met over the Internet produced DeCSS, a program capable of descrambling CSS or "decrypting" DVD encryption codes.¹⁵² He claimed that he created DeCSS, a Windows executable file, in order to use DVDs on his Linux-based system, which did not support DVDs at the time.¹⁵³ Johansen then posted on his personal website the DeCSS executable code, allowing non-licensed computers to play complete movie files and to copy decrypted files onto computer hard drives.¹⁵⁴ In November 1999, the defendants in *Reimerdes*, 2600 Enterprises and owner Eric Corley, publisher of "The Hacker Quarterly," posted the DeCSS source and object code on their website, 2600.com.¹⁵⁵ At this website, users could download DeCSS software directly or they could link to other websites that posted DeCSS in order to unscramble the CSS protection code.¹⁵⁶ In October 1999, the MPAA became aware of the post-

ing of DeCSS on the Internet and sent websites with DeCSS posted on them cease and desist letters.¹⁵⁷ Because 2600.com did not comply with their requests, the MPAA filed a lawsuit against Corley in January 2000, seeking to enjoin 2600.com from posting and later from the "electronic civil disobedience" of linking to other websites that posted DeCSS technology on them.¹⁵⁸

1. *The Parties' Contentions*

In the *Reimerdes* case, the MPAA argued that defendant 2600.com's posting of DeCSS and linking to other websites with DeCSS violated Section 1201(a)(2) of the DMCA, the copyright anti-circumvention provision.¹⁵⁹ They stressed that in order for copyright holders to "make their works available in digital form without the threat of piracy," the DMCA technological circumvention restrictions should be enforced.¹⁶⁰ The defendants argued that posting and linking to DeCSS was fair use within the meaning of the Copyright Act.¹⁶¹ They also asserted a First Amendment claim, arguing that the DMCA violated freedom of speech as it applied to computer programs or code.¹⁶²

2. *The District Court's Opinion Finding DeCSS a Clear Violation of Title I of the DMCA*

Judge Kaplan for the U.S. District Court for the Southern District of New York held in *Reimerdes* that defendant 2600.com's posting and linking of DeCSS computer code was a clear violation of the DMCA, and that plaintiff MPAA was entitled to both injunctive and monetary relief.¹⁶³

¹⁵⁰ Socolow, *supra* note 124, at s7.

¹⁵¹ *Napster*, 114 F. Supp. 2d at 911; *see also* Berschadsky, *supra* note 35, at 767.

¹⁵² *Reimerdes*, 111 F. Supp. 2d at 311 (noting that Norwegian prosecutors filed an action against Johansen in Jan. 1999 as a result of his creation of DeCSS).

¹⁵³ P.J. Connolly, *Enterprise Toolbox: 'The Sharing' Debate: When Source Code is Outlawed, Only Outlaws Will Have the Source Code*, INFOWORLD, Sept. 4, 2000, available at 2000 WL 20918043 [hereinafter Connolly] (discussing new technologies and the file-sharing debate).

¹⁵⁴ *Id.*

¹⁵⁵ *Reimerdes*, 111 F. Supp. 2d at 308–09 (stating that in the hacker community, Corley goes by the name of Emmanuel Goldstein, the underground leader in George Orwell's classic, 1984).

¹⁵⁶ *Id.* at 311–12; *see also id.* at 309–10 (detailing how CSS

protects motion pictures from being decrypted and copied, or viewed on non-CSS-licensed DVD players or hard drives).

¹⁵⁷ *Id.* at 312.

¹⁵⁸ *Id.* The initial lawsuit was filed against Corley and two other defendants who later entered into consent agreements with the plaintiffs. 2600.com was subsequently added as a defendant in an amended complaint. *See id.* at 312 n.91.

¹⁵⁹ Eric J. Sinrod, *Judge Rules Against DeCSS Download*, UP-SIDE TODAY, Aug. 29, 2000, available at 2000 WL 4725619 [hereinafter Sinrod] (discussing the competing arguments set forth in the *Reimerdes* case); 17 U.S.C. § 1201(a)(2).

¹⁶⁰ Sinrod, *supra* note 159; 17 U.S.C. § 1201(a)(2).

¹⁶¹ *Id.*; *see also Reimerdes*, 111 F. Supp. 2d at 321–22.

¹⁶² Sinrod, *supra* note 159; *see also Reimerdes*, 111 F. Supp. 2d at 325–26.

¹⁶³ *Reimerdes*, 111 F. Supp. 2d at 346.

a. *Posting and Linking to DeCSS Violates Anti-circumvention Provision*

The court first found that DeCSS “clearly is a means of circumventing a technological access control measure.”¹⁶⁴ Furthermore, the court ruled that if CSS fell within subsections (A), (B) or (C) of Section 1201(a)(2) of the DMCA and none of the statutory exceptions applied to 2600.com, defendant’s posting of DeCSS violated the DMCA.¹⁶⁵ Second, the court found that CSS effectively controls access to plaintiffs copyrighted DVDs and falls within Section 1201(a)(2)(A) because “in the ordinary course of its operation, [the measure] requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”¹⁶⁶ Third, because the sole purpose for creating DeCSS was to decrypt CSS, DeCSS was designed primarily to circumvent CSS.¹⁶⁷ Thus, by posting DeCSS on 2600.com, the court held that the defendants distinctly violated Section 1201(a)(2)(A) of the DMCA. Under the same analysis, the court concluded that the defendants also had violated Section 1202(a)(2)(B) because the primary purpose or use of DeCSS was to circumvent CSS.¹⁶⁸

The defendants argued that DeCSS fell within the reverse engineering, encryption research and security testing exceptions to circumvention of technological measures under Section 1201(a) of the DMCA.¹⁶⁹ Defendants argued that the reverse engineering exception in the DMCA applied because “DeCSS is necessary to achieve interoperability between computers running the Linux op-

eration system and DVDs.”¹⁷⁰ In rejecting this argument, Judge Kaplan stated that the reverse engineering exception applied only to those who actually acquired the information that they later reverse engineered.¹⁷¹ Thus, this exception was inapplicable to defendants because they did not create DeCSS but merely posted it after Johansen had created it.¹⁷² Although one of the purposes for Johansen’s developing DeCSS was to build a Linux DVD player, Judge Kaplan found that it was not the sole purpose, as required by the reverse engineering exception, because DeCSS was developed on Windows, a more widely used operating system.¹⁷³ Judge Kaplan rejected defendant’s argument in applying the encryption research exception because they posted DeCSS on the Internet and were not engaged in “good faith encryption research.”¹⁷⁴ Lastly, the judge rejected the defendants’ security testing argument because posting DeCSS had nothing to do with testing computers within the meaning of that subsection of the DMCA.¹⁷⁵

On the issue of linking to other websites posting DeCSS, the court held in *Reimerdes* that 2600.com’s linking constituted an “offering to the public, provid[ing], or otherwise traffic[king]” in DeCSS, violating the plain meaning of Section 1201(a)(2) of the DMCA.¹⁷⁶ Because the 2600.com “linked to sites that automatically commence the process of downloading DeCSS upon a user being transferred to [their] hyperlinks,” defendants engaged in the “functional equivalent of transferring the DeCSS code to the user them-

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 319; 17 U.S.C. § 1201(a)(2)(A)–(C).

¹⁶⁶ *Reimerdes*, 111 F. Supp. 2d at 318.

¹⁶⁷ *Id.* at 318–19; 17 U.S.C. § 1201(a)(2)(A).

¹⁶⁸ *Reimerdes*, 111 F. Supp. 2d at 318; *see also* 17 U.S.C. § 1201(a)(2)(B).

¹⁶⁹ *Reimerdes*, 111 F. Supp. 2d at 319–21; 17 U.S.C. § 1201(f), (g)(4), and (j).

¹⁷⁰ *Reimerdes*, 111 F. Supp. 2d at 320.

¹⁷¹ *Id.*

¹⁷² 17 U.S.C. § 1201(f); *id.* at § 1201(f)(3) (providing that one who reverse engineers information may make the information “available to others, if the person . . . provides such information solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement”).

¹⁷³ *Reimerdes*, 111 F. Supp. 2d at 320 (finding that the “right to make information available extends only to dissemination ‘solely for the purpose’ of achieving interoperability as defined in the statute”).

¹⁷⁴ 17 U.S.C. § 1201 (g)(2)(A)–(D). Circumvention of technological measures is permitted in the course of good faith encryption if:

- (A) the person lawfully obtained the encrypted copy, phonorecord, performance, or display of the published work;
- (B) such act is necessary to conduct such encryption research;
- (C) the person made a good faith effort to obtain authorization before the circumvention; and
- (D) such act does not constitute infringement under this title.

Id.

¹⁷⁵ 17 U.S.C. § 1201(j). The security testing provision applies when, “accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigation, or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer.” *Id.*

¹⁷⁶ *Reimerdes*, 111 F. Supp. 2d at 324; 17 U.S.C. § 1201(a)(2)(A).

selves.”¹⁷⁷ However, the court limited future linking liability to parties who know that infringing material is contained on the linked site, know that the circumvention technology may not be offered lawfully or use the “link for the purpose of disseminating that technology.”¹⁷⁸

b. *Fair Use Defense Rejected*

Judge Kaplan found the defendant’s fair use argument without merit in *Reimerdes*. The judge reasoned that defendants had not been sued for copyright infringement but for circumvention of technological measures that effectively control access to a copyrighted work, to which Congress never intended fair use to apply under the Copyright Act.¹⁷⁹ First, the court noted that the fair use defense to copyright infringement would be applicable only provided that the copyright holder authorized access to a copy of the copyrighted work.¹⁸⁰ Second, Congress had delayed the effective date of Section 1201(a)(1) for two years pending an investigation of how circumvention could be reconciled with fair use concerns under the DMCA.¹⁸¹ Third, Congress already had created certain exceptions to Section 1201(a) analogous to fair use, such as reverse engineering, encryption research and security testing.¹⁸² Lastly, the court noted that Congress never meant for Section 1201 to incorporate *Sony* and its explanation of fair use.¹⁸³

c. *The First Amendment: Computer Code Is Not Pure Speech*

The defendants argued that computer code is speech, which is entitled to strict scrutiny under the First Amendment and thus is exempt from government regulation like the DMCA.¹⁸⁴ In response to this argument, Judge Kaplan stated that

“[c]omputer code is expressive. To that extent, it is a matter of First Amendment concern. But computer code is not purely expressive any more than the assassination of a political figure is purely a political statement.”¹⁸⁵ The “expressive element” of code “no more immunizes its functional aspects from regulation than the expressive motives of an assassin immunize the assassin’s actions.”¹⁸⁶ The court also noted that DeCSS is computer code, which like the transmission of a computer virus, has the ability to disable our nation’s computer networks on which we depend.¹⁸⁷ Regulations of computer code are necessary because “[t]he Constitution . . . is a framework for building a just and democratic society . . . not a suicide pact.”¹⁸⁸ Congress possesses the power to establish content-neutral regulations that incidentally effect expression like computer code.¹⁸⁹ Thus the DMCA, as applied to the posting and linking of DeCSS, did not contravene the First Amendment.

3. *Analysis of the District Court’s Ruling*

Judge Kaplan’s ninety-page opinion examining DeCSS under the DMCA was, for the most part, an accurate interpretation of that law. Although his opinion expressed an obvious hostility toward the defendants in *Reimerdes* and sympathy for the copyright holders, his decision will likely be upheld on appeal on grounds of a clear public policy against hacking. The facts in *Reimerdes* also seem to fit within the provisions of Section 1201 of the DMCA.

However, the opinion raises serious questions. First, the court held that “CSS effectively controls access to plaintiffs’ copyrighted work” because “in the ordinary course of its operation . . . [it] ‘actually works’ to prevent access to the protected work.”¹⁹⁰ Yet, the fact that the encryption technology was broken by a teenager so quickly and is

¹⁷⁷ *Reimerdes*, 111 F. Supp. 2d at 324.

¹⁷⁸ *Id.* at 341; see also Sinrod, *supra* note 159, at *2 (discussing future linking liability under the DMCA).

¹⁷⁹ *Reimerdes*, 111 F. Supp. 2d at 322.

¹⁸⁰ *Id.* See generally Sinrod, *supra* note 159, at *2 (discussing the fair use defense used in *Reimerdes*).

¹⁸¹ *Reimerdes*, 111 F. Supp. 2d at 322.

¹⁸² *Id.*

¹⁸³ *Id.* at 324.

¹⁸⁴ *Id.* at 304 (summarizing the defendants’ position in the *Reimerdes* opinion).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*; see also Mark Hamblett, *Movie Studios Score DVD Victory*, N.Y. L.J., Aug. 18, 2000, at 1 (Col. 3) [hereinafter Ham-

blett] (discussing Judge Kaplan’s First Amendment analysis).

¹⁸⁷ *Reimerdes*, 111 F. Supp. 2d at 304. See generally Sinrod, *supra* note 159 (discussing the free speech argument).

¹⁸⁸ *Reimerdes*, 111 F. Supp. 2d at 318.

¹⁸⁹ *Id.* at 333. The court limited this holding to:

1) programs that circumvent access controls to copyrighted works in digital form in circumstances in which, 2) there is no other practical means of preventing infringement through use of the programs[,] and 3) the regulation is motivated by a desire to prevent performance of the function for which the programs exist rather than any message they might convey.

Hamblett, *supra* note 186.

¹⁹⁰ *Reimerdes*, 111 F. Supp. 2d at 317.

now widely available over the Internet shows that CSS does not “actually work.” Judge Kaplan ignored the fact that you cannot “unring” a bell and a judicial decision does not stop the spread of DeCSS on the Internet. If a technology such as CSS does not even minimally do its job, it may not truly be an effective measure. There are no clear-cut standards for this kind of security protection technology. Just because a company claims it has a technology of a certain quality does not mean that it is fool proof or that those companies are justified in accusing people of breaking their poor excuse for a protection measure. A more efficient solution might have been to warn the MPAA to recognize CSS’ failure and to promote finding a way to make a more effective control measure.

Second, the court found that Johansen’s primary purpose for developing DeCSS was not to make a Linux DVD player, and that “[s]ubstantial questions have been raised both at trial and elsewhere as to the veracity of Mr. Johansen’s claim.”¹⁹¹ However, the court never made it clear why Johansen was not a credible witness. Moreover, the court did not explain why it was unreasonable to believe that Johansen’s creation of a Linux DVD player was not the primary purpose of his writing DeCSS (if the technology’s primary purpose was to circumvent a technological measure, the defendant will be liable under the DMCA).¹⁹² In order to decrypt files on a Linux machine, Johansen originally had to encrypt the code on a Windows computer because a Linux program at that time did not support the file system for DVDs.¹⁹³ The judge merely asserted that Johansen had knowledge that DeCSS could be used and copied on computers running Windows, even though Judge Kaplan never stated why the original Linux purpose was only secondary to evading CSS.¹⁹⁴

Third, the judge described in great detail the

legislative history of the DMCA and found that the *Sony* fair use defense did not apply to circumvention technology, but his analysis is inconsistent with the statute’s purpose of encouraging new technologies.¹⁹⁵ Judge Kaplan casually noted that “[a]ll or substantially all motion pictures available on DVD are available also on videotape. In consequence, anyone wishing to make lawful use of a particular movie may buy or rent a videotape, play it, and even copy all or part of it with readily available equipment.”¹⁹⁶ In essence, he stated that consumers should use “old technology [not] affected by the DMCA” in order to avail themselves of the privileges of the long-standing and highly regarded fair use doctrine.¹⁹⁷

A fourth point is the issue of whether computer code is speech. The district court clearly went too far in drawing an analogy between computer code and a political assassination.¹⁹⁸ A better comparison would have been to analogize the instructions for an assassination to copying a computer program, compiling it, and executing it in its proper setting or platform, as Corley has maintained.¹⁹⁹ This better analogy requires acting on the instructions in order to complete the task.²⁰⁰ However, it is likely that computer code will not be afforded the same level of First Amendment protection as pure speech. 2600.com may, therefore, be subject to some level of government regulation.²⁰¹

The decision in *Reimerdes* also tried to achieve the goal of scaring off hackers who have increasingly compromised the computer systems on which our nation depends. However, in his decision, Judge Kaplan avoided the defendant’s argument that “an injunction would be futile because DeCSS is already all over the Internet.”²⁰² This question needs to be addressed because of the Internet’s pervasiveness and the ease with which savvy computer users seem to be able to hack existing computer security codes. Facing the same

¹⁹¹ Eric Corley, *Analysis of the Decision Against 2600.com*, THE HACKER Q., at <http://www.2600.com/news/2000/0821.html> (Aug. 21, 2000) [hereinafter Corley] (analyzing the district court’s decision against 2600.com and challenging Judge Kaplan’s dismissal of Johansen’s testimony).

¹⁹² *Reimerdes*, 111 F. Supp. 2d at 294.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 323–24.

¹⁹⁶ *Id.*

¹⁹⁷ Corley, *supra* note 191.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389 (1969) (holding that the First Amendment, aimed at protecting and furthering communications, does not prevent “the Government from making radio communications possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum”). Thus, because of the scarcity of radio frequencies and the uniqueness of the radio medium, the government is allowed to put restraints on the ability to obtain a broadcasting license. *See id.* at 390. In *Red Lion*, the Supreme Court further found that although broadcasting is a medium affected by First Amendment interests, differences in the characteristics of emerging media warrant differences in First Amendment standards. *Id.* at 386.

²⁰² *Reimerdes*, 111 F. Supp. 2d at 343.

dilemma in the mid-1980s, the software industry abandoned most forms of digital encryption copy protection.²⁰³ This should not suggest that the MPAA should abandon its own vigorous efforts for fear of hacking. However, it seems the more copyright owners lock up the rights to their material, the more rebellious users get in trying to access this material.²⁰⁴

A decision preventing linking to DeCSS and imposing liability on one website also seems futile due to the vastness of the Internet. The implication of a holding that equates linking to the accepted prohibition against offering pirated copies of copyrighted material yourself could be dangerous to the Internet's future growth.²⁰⁵ To prove this point, the 2600.com website currently lists but does not link to "mirror sites" that post DeCSS.²⁰⁶ They also provide a link to the Disney search engine, where users can search for sites that contain the DeCSS code.²⁰⁷ The court did not address some of these potential problems. Judge Kaplan's decision seemed clearly pro-entertainment industry and, on appeal, consumers will need to hear a better argument on why the freedom inherent in these new technologies are increasingly being taken away by powerful industry groups like the MPAA. A final interesting note is that in a similar suit filed in California by the MPAA to stop a website from posting the DeCSS code, the complaint included an affidavit with a copy of the DeCSS computer code.²⁰⁸ This complaint was not filed under seal initially.²⁰⁹ Approximately two weeks later, however, the film industry and their attorneys did request that it be placed under seal, by which time several websites had already posted the DeCSS code as part of the publicly available affidavit.²¹⁰

B. RIAA and Title II of the DMCA: *A & M Records, Inc. v. Napster, Inc.*

1. *The Parties and Procedural History*

On December 6, 1999, almost a year before *Reimerdes*, the RIAA filed a suit in the U.S. District Court for Northern California, against Napster, Inc.²¹¹ Napster is a Silicon Valley Internet startup that facilitates peer-to-peer file sharing, enabling its users to download MP3 files at no cost.²¹² The RIAA members alleged that Napster was liable for contributory copyright infringement and vicariously liable for the direct copyright infringement of its users.²¹³ Napster filed a motion for summary adjudication under Section 512(a), the safe harbor provision of the DMCA, arguing that plaintiffs were not entitled to monetary damages or injunctive relief except for narrow injunctions against individual copyright infringers.²¹⁴ The court denied Napster's motion on May 12, 2000, holding that Napster did not meet the requirements of Section 512(a) of the DMCA.²¹⁵ In July 2000, the Senate judiciary committee held a hearing on "The Future of Digital Music" and heard testimony from key players in both the recording industry and the digital downloading industry.²¹⁶ On July 26, 2000, the district court granted RIAA's motion for a preliminarily injunction against Napster "engaging in or assisting others in copying, downloading, uploading, transmitting, or distributing copyrighted music without the express permission of the rights owner."²¹⁷ The court also ordered Napster to comply by July 28, 2000.²¹⁸ In an eleventh-hour reprieve granted by the Ninth Circuit Court of Appeals on July 28, 2000, Circuit Judge Kozinski stayed the lower

²⁰³ *Hearings*, *supra* note 17 (testimony of Gene Kan, Gnutella, Developer and Founder, Infrasearch, Inc.) (stating that encryption technology seldom works, as the encryption for Microsoft's non-MP3 digital music format, Windows Media Audio, was broken instantly after its release).

²⁰⁴ Lardner, *supra* note 6, at 56 (discussing consumer rebellion against digitally protected formats).

²⁰⁵ Corley, *supra* note 191.

²⁰⁶ See generally 2600.com, at <http://www.2600.com> (last modified Oct. 18, 2000). "Mirror sites" are sites that 2600.com formerly posted that linked to sites containing DeCSS code but now are merely listed on the 2600.com website. *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Simmons*, *supra* note 7, at 14 (citing DVD Copy Control Assoc., Inc. v. McLaughlin, No. CV 768804, 2000 WL 48512 (Cal. Super. Ct. 2000)).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *A & M Recordings, Inc. v. Napster, Inc.*, No. C99-05183 MHP, 2000 WL 573136, at *1 (N.D. Cal. May 12, 2000).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *The Future of Digital Music: Is There and Upside to Downloading? Hearing Before the Senate Judiciary Comm.*, 106th Cong., at http://senate.gov/~judiciary/7112000_gjh.htm. (2000).

²¹⁷ *A & M Recordings, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 900 (N.D. Cal. 2000).

²¹⁸ *Id.*

court's injunction that would have shut down Napster on that date.²¹⁹

2. *The Development of Napster*

Shawn Fanning, a nineteen-year-old college student who wanted to facilitate the sharing of MP3 files over the Internet, created and incorporated Napster in 1999.²²⁰ Before Napster, people often used search engines, like Yahoo, to search for websites that possibly contained desired MP3 files, a tedious process that often lead only to "dead links."²²¹ Fanning envisioned people sharing MP3 files directly from their hard drives with a centralized database, "combined with software that converts each user's computer into a server."²²² Currently, users can access the Napster website to download Napster's proprietary file-sharing software, MusicShare, free of charge.²²³ Once a user registers and creates a user name, he or she logs on and is connected to the database located on Napster's website.²²⁴ A user can search in real time for MP3 files offered by other Napster "hosts" through the Napster database, and also tell it which files he or she is willing or not willing to share.²²⁵ The user can locate a particular artist or song by simply entering the particular name.²²⁶ This information is transmitted to the Napster network and in return the Napster server sends the requesting user a list of specific MP3 file names offered by other hosts.²²⁷ Once a user chooses a file to download, Napster's servers send a message to the appropriate host, "which assumes the role of server and immediately begins transferring the file directly to the user through each party's respective ISP."²²⁸ Unlike MP3.com, Napster does not store any CDs or MP3 files on its servers.²²⁹ Only the Internet Protocol ("IP") addresses for each host are stored on Napster's cen-

tral database, which is updated as hosts log on or off.²³⁰

A second aspect of Napster is the "hotlist" function, which permits users to access and browse other hosts' MP3 file libraries.²³¹ Other functions of the Napster service include a chat service and a New Artist Program, allowing signed and unsigned artists to create artistic profiles that Napster accepts only if those artists authorize sharing of their music.²³² Napster is presently financed solely by venture capital, and does not make any revenue or profit.²³³ Napster eventually plans to obtain revenue through advertising, commissions from links to commercial websites, subscriber fees and direct CD sales.²³⁴

Napster is considered the fastest-growing software application ever recorded by Internet research companies.²³⁵ Its user base quadrupled between February and July 2000.²³⁶ In June 2000, there were approximately 600,000 MP3 files available for sharing.²³⁷ Currently, as many as 10,000 music files are shared per second over Napster.²³⁸ The service is growing at 200% a month, and by the end of 2000, there are projected to be 75 million Napster users.²³⁹ Approximately 87% of the music available on Napster belongs to the RIAA or other copyright holders.²⁴⁰

3. *The Parties' Initial Arguments in Napster*

Napster contended that it met the definition of "service provider" under the DMCA and satisfied the five requirements for an exemption to the DMCA found in Section 512(a) because: (1) Napster users, not Napster itself, initiate the transmission of MP3 files; (2) the transmission occurs automatically; (3) Napster does not choose any of the recipients; (4) Napster does not copy any of the material during transmission; and (5) the con-

²¹⁹ *A & M Recordings, Inc. v. Napster, Inc.*, Nos. 00-16401 and 00-16403, 2000 WL 1055915, at *1 (9th Cir. July 28, 2000).

²²⁰ Berschadsky, *supra* note 35, at 759.

²²¹ *Id.* at 759 (discussing the birth of Napster). "Dead links" are invalid links that a search engine may lead a user to where the website is either "closed or temporarily off-line." *Id.*

²²² *Id.*

²²³ *Id.* at 760.

²²⁴ *Napster*, 114 F. Supp. 2d at 905 (discussing Napster technology).

²²⁵ *Id.*

²²⁶ *Id.* at 906.

²²⁷ *Id.*

²²⁸ Berschadsky, *supra* note 35, at 760.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Napster*, 114 F. Supp. 2d at 906.

²³² *Id.* at 907.

²³³ Berschadsky, *supra* note 35, at 761.

²³⁴ *Id.*

²³⁵ Peter Svensson, *Off the Charts*, ABCNEWS.COM, at <http://more.abcnews.go.com/sections/tech/dailynews/napster000911.html> (Sept. 11, 2000).

²³⁶ *Id.*

²³⁷ Berschadsky, *supra* note 35, at 761.

²³⁸ *Napster*, 114 F. Supp. 2d at 902.

²³⁹ *Id.*

²⁴⁰ *Id.* at 903.

tent is not modified during transmission.²⁴¹ RIAA argued that Subsection 512(n) of the DMCA required each of Napster's functions to be analyzed independently of the others.²⁴² When so analyzed, all of Napster's stated functions did not fall within the safe harbor found in Section 512(a).²⁴³ RIAA also alleged that Napster did not meet the more rigorous lack of actual knowledge standard under Section 512(d). RIAA's principal argument was that Napster did not perform the passive conduit function required by DMCA Section 512(a).²⁴⁴ Lastly, RIAA argued that Napster did not meet the general eligibility requirements of Section 512(i) for exemption from DMCA's provisions because Napster did not discipline copyright infringers and only adopted a copyright compliance policy after litigation began.²⁴⁵

4. *Title II Safe Harbor Provision and the District Court's Denial of Napster's Motion for Summary Judgement*

Judge Patel of the District Court for Northern California found that Napster did not meet the requirements of Section 512(a)'s safe harbor provision of the DMCA and Napster was not entitled to summary judgement.²⁴⁶ The judge first reasoned that Section 512(a) applied to ISPs "transmitting, routing, or providing connections for, material through a system" and that Napster does not perform a "passive conduit" function.²⁴⁷ Thus, the files are not transmitted "through" the Napster system.²⁴⁸ Under the Napster system, MP3 files are transmitted "from the Host user's hard drive and Napster browser, through the Internet to the recipient's Napster browser and hard drive."²⁴⁹ The judge also noted that Napster stressed the passivity of its role and expressly denied that "the transmission of MP3 files ever passes through its servers."²⁵⁰ In addition, the court found that the "routing" or "providing connections" was through

the Internet itself from the host to the requesting user and not through the Napster server.²⁵¹ Napster "enables or facilitates the initiation of connections, but these connections do not pass through the system within the meaning of [Section] 512(a)."²⁵² Napster thus failed to qualify for the Section 512(a) safe harbor because it did not transmit, route, or provide connections through its system to hosts and individual users. The court did not, however, rule on the applicability of Section 512(d) because Napster did not raise it as a ground for summary judgement.²⁵³ Lastly, because Napster never reasonably implemented a policy of terminating repeat copyright infringers and Napster's copyright compliance policy was not timely, Napster did not meet the conditions of eligibility for relief under Subsection 512(i) of the DMCA.²⁵⁴

5. *Analysis of the District Court's Interpretation of Title II of the DMCA*

Judge Patel's analysis of the Napster case under Title II of the DMCA was a question of first impression. One of the potential flaws with Judge Patel's opinion was her rigid application of Section 512(a)'s definition of "through a system."²⁵⁵ Although MP3 files never actually pass through Napster's servers, information about a user's request for a particular recording and Napster's subsequent facilitated response regarding host IP addresses and availability of the material certainly does pass through Napster. The judge also accused Napster users of sharing music with the entire world but failed to recognize that Napster is merely a one-to-one file-sharing system.²⁵⁶ If Section 512(a) does not apply to file-sharing services like Napster, this narrow reading of the DMCA could stifle other Internet ventures from using or expanding on this revolutionary technology that requires central data indexes to work.²⁵⁷ Legiti-

²⁴¹ *Napster*, 2000 WL 573136, at *4.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at *10.

²⁴⁷ *Id.* at *6 (finding legislative history of the DMCA explains that the word "conduit" means "through a system"); 17 U.S.C. § 512(a).

²⁴⁸ *Copyrights: DMCA's Liability Exemptions Don't Protect Online Music System From Infringement Suit*, U.S. L. WK. DAILY EDITION, May 25, 2000, at d6, available at <http://pub.bna.com/ptcj/9905183.htm> [hereinafter U.S. L. WK. DAILY EDITION].

²⁴⁹ *Napster*, 2000 WL 573136, at *7.

²⁵⁰ *Id.*

²⁵¹ *Id.* See generally U.S. L. WK. DAILY EDITION, *supra* note 248.

²⁵² *Napster*, 2000 WL 573136, at *8.

²⁵³ *Id.* at *6 n.6.

²⁵⁴ *Id.* at *9.

²⁵⁵ 17 U.S.C. § 512(a).

²⁵⁶ See John Heilemann, *David Boies—The Wired Interview*, WIRED, Oct. 2000, at 255 [hereinafter Heilemann].

²⁵⁷ See, e.g., *id.* at 254.

mate Internet companies need to be able to grow unencumbered by the threat of copyright infringement lawsuits.

Moreover, in her opinion, Judge Patel noted that although a Section 512(d) claim was not presented by Napster, they could not rely on it as a safe harbor because Napster had "reason to know" of the third party's copyright infringement.²⁵⁸ However, Section 512(d) requires an "actual knowledge" or a "red flag" standard, which is much more than a mere "reason to know."²⁵⁹ The red flag standard is based on an ISP's subjective awareness and "differs from previous standards, under which a defendant may be liable for contributory infringement if it knows or should have known that material was infringing. [The Section 512 standard] is whether the service provider deliberately proceeded in the face of blatant factors of which it is aware."²⁶⁰ Even if Napster had failed to comply with the red flag standard, it is necessary to use the proper standard in a precedent-setting case like this one. Congress could not have intended a mere knowledge standard to apply to the DMCA because, if ISPs do not know that their users are engaging in copyright infringement, there would be no third-party ISP liability under the Act.²⁶¹

Lastly, the court found that Napster did not meet the reasonably implemented policy standard for repeat infringers required by DMCA Section 512(i)(1)(A) because Napster did not block the IP addresses of infringing users.²⁶² However, this is not a requirement anywhere in the DMCA.²⁶³ Under Section 512(j), the only type of permissible court injunction against a protected ISP is termination of the subscriber accounts "that are specified in the [judge's] order."²⁶⁴ Napster also claimed that, as of October 2000, it had terminated hundreds of thousands of users under the DMCA notification procedure.²⁶⁵ The opinion in this case, like *Reimerdes*, seems sympathetic to entertainment copyright holders and pessimistic

about the future of file-sharing technology in that the judges in both cases failed to consider lawful aspects of the technology. On appeal, Title II will hopefully be analyzed with more emphasis on the prospective legitimate uses of peer-to-peer file swapping on the Internet like Napster's technology.

V. THE DISTRICT COURT'S PRELIMINARY INJUNCTION AGAINST NAPSTER

A. Napster's Second Round of Arguments

In opposition to the RIAA's requests to enjoin Napster at least temporarily from copyright infringing activities, Napster asserted the fair use affirmative defense.²⁶⁶ Napster argued that the preliminary injunction would impose a prior restraint on speech, violating its First Amendment rights and those of Napster users and artists.²⁶⁷ Napster also asserted that RIAA members had misused their copyrights and expanded their monopoly beyond the permissible scope under the Copyright Act.²⁶⁸ Finally, Napster contended that the RIAA members had waived their entitlement to copyright protection because they accelerated the proliferation of MP3 files over the Internet by seeking business partners for their commercial downloading ventures and development of music players that encouraged unauthorized ripping.²⁶⁹

1. *Fair Use and Staple Article of Commerce Affirmative Defenses Rejected*

In her opinion, Judge Patel found first that the RIAA had established a prima facie case of direct infringement by Napster users because "virtually all Napster users engage in unauthorized downloading or uploading of copyrighted music."²⁷⁰ Direct copyright infringement was a threshold requirement in order for the RIAA to prevail on liability for contributory or vicarious

²⁵⁸ Brief of Ad Hoc Copyright Coalition, Commercial Internet Exch., Computer & Communications Indus. Ass'n, Info. Tech. Ass'n of Am., Netcoalition.com, U.S. Internet Indus. Ass'n, and U.S. Telecomm. Ass'n as Amici Curiae Supporting None of the Parties at 16, *A & M Records, Inc. v. Napster*, 2000 WL 1055915 (9th Cir. July 28, 2000) (Nos. 00-16401 and 00-16403).

²⁵⁹ *Id.* at 17.

²⁶⁰ *Id.* (citing *NIMMER & D. NIMMER, NIMMER ON COPYRIGHT* § 12B.04[A][1] at 12B-35 (2000)).

²⁶¹ Heilemann, *supra* note 256, at 256 (discussing the

Napster case and the arguments made).

²⁶² *Napster*, 2000 WL 573136, at *9; 17 U.S.C. § 512(i)(1)(A).

²⁶³ 17 U.S.C. § 512(i).

²⁶⁴ 17 U.S.C. § 512(j)(1)(A)(ii).

²⁶⁵ Heilemann, *supra* note 256, at 255.

²⁶⁶ *Napster*, 114 F. Supp. 2d at 912.

²⁶⁷ *Id.* at 922.

²⁶⁸ *Id.* at 923.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 911.

copyright infringement against Napster. Judge Patel found next that Napster had minimal commercially noninfringing uses.²⁷¹ In applying the four fair use factors in Section 107 of the Copyright Act, Judge Patel opined that the purpose and character of the illegal use was not necessarily commercial, or personal or private because files are sent to anonymous requesting users free of charge by Napster.²⁷² The second factor cut against Napster because the works transferred or downloaded are creative in nature and constitute entertainment.²⁷³ Thirdly, music files are generally copied in their entirety as opposed to only portions of the works. Lastly, the effect on the potential market for the works is harmful because CD sales at colleges are reduced and because it raises a barrier to RIAA's entry into the digital music Internet market.²⁷⁴ Thus, the Napster system could not be considered a fair use of plaintiff's copyrighted works.

The court also refused to draw an analogy between Napster users "sampling" MP3 files for the purchase of CDs in the future with the fair use of "time-shifting" found in *Sony* that allowed private, noncommercial copying of free television broadcasts using a VCR.²⁷⁵ The VCR purchasers in *Sony* merely enjoyed taped broadcasts at home while "a Napster user who downloads a copy of a song to her hard drive may make that song available to millions of other individuals even if she eventually chooses to purchase the CD. So-called sampling on Napster may quickly facilitate unauthorized distribution at an exponential rate."²⁷⁶ The court similarly refused to accept the proposition that *Sony* "time-shifting" applied to "space-shifting," or converting a purchased CD into MP3 format in order to make it a more portable form of media.²⁷⁷ Even if this were considered a fair use, "space-shifting" would not be "substantial enough to preclude liability under the staple article of

commerce doctrine."²⁷⁸ In refusing to apply that doctrine, the court noted that in *Sony* the defendant's only participation included manufacturing and selling VCRs.²⁷⁹ In comparison, Napster "maintains and supervises an integrated system that users must access to upload or download files," thereby controlling and facilitating the unauthorized file sharing.²⁸⁰ Finally, although Napster's New Artist Program and chat room services were considered by both the court and RIAA to be a fair use, they did not represent a commercially significant aspect of Napster.²⁸¹

2. *Contributory and Vicarious Copyright Infringement by Napster*

The court noted that once the RIAA plaintiffs showed direct copyright infringement by Napster users, in order to prevail on the preliminary injunction, they also must show a likelihood of success on the contributory copyright infringement claim against Napster.²⁸² On this issue, Judge Patel found that Napster had reason to know of their users' direct copyright infringement based on a document written by a Napster co-founder who acknowledged the need to remain ignorant of users' real names and IP addresses because "they are exchanging pirated music."²⁸³ Napster also received actual notice of direct infringement from RIAA, who informed them of over 12,000 infringing files.²⁸⁴ Napster relied on *Religious Technology Center v. Netcom Online Communication Services, Inc.*²⁸⁵ in contending that titles in Napster's file indexes could not distinguish infringing from noninfringing files, and thus, Napster never knew about copyright infringement engaged in by particular users.²⁸⁶ The court rejected this argument, concluding that actual knowledge of specific acts of users' copyright infringement was not required.²⁸⁷ Unlike the bulletin board service oper-

²⁷¹ *Id.* at 912.

²⁷² *Id.*; see fair use factors, *supra* note 113; 17 U.S.C. § 107.

²⁷³ *Napster*, 114 F. Supp. 2d at 913.

²⁷⁴ *Id.*

²⁷⁵ *Id.*; see also *Copyrights: District Court Explains Copyright Rulings Supporting Last Month's Napster Injunction*, U.S. L. WK. EDITION, at d4, available at <http://pub.bna.com/lw/995183.htm> (Aug. 22, 2000) [hereinafter *Napster Injunction*].

²⁷⁶ *Napster*, 114 F. Supp. 2d at 913.

²⁷⁷ *Id.*

²⁷⁸ *Id.*; *Diamond Multimedia*, 180 F.3d at 1079 (holding Rio MP3 Player, which copies MP3 files from computer hard drives in order to make them portable—called "space-shift-

ing"—was a fair use).

²⁷⁹ *Napster*, 114 F. Supp. 2d at 916.

²⁸⁰ *Id.* at 917.

²⁸¹ *Id.*

²⁸² *Id.* at 918.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ 907 F. Supp. 1361 (N.D. Cal. 1995).

²⁸⁶ *Id.* (holding where a bulletin board service operator can not reasonably verify a claim of infringement, the operator's lack of knowledge will not expose her to liability for contributory infringement).

²⁸⁷ *Napster*, 114 F. Supp. 2d at 918.

ator in *Netcom*, Napster is not an ISP that acts as a mere conduit for the transfer of files.²⁸⁸ Finally, the court found that Napster materially contributed to the copyright infringing activity by supplying the “proprietary software, search engines, servers, and means of establishing a connection between users’ computers.”²⁸⁹

As to the vicarious copyright infringement claim made by the RIAA, the court found that because Napster maintained that they attempted continually to improve methods for blocking repeat infringers, Napster had basically admitted that the company had the ability to supervise and police the infringing activity.²⁹⁰ Napster also was found to have a direct financial interest in the copyright infringing activity because it disclosed future plans to “monetize” its user base even though Napster currently receives no revenue.²⁹¹ In conclusion, the court found that RIAA had a reasonable likelihood of success on both its contributory and vicarious infringement claims against Napster.²⁹²

3. *The Rejection of Napster’s First Amendment Challenge, Misuse of Copyright Defense and Waiver*

Napster argued that the First Amendment afforded protection for its file directories.²⁹³ Because Napster offers an electronic directory that does not actually contain copyrighted material, the preliminary injunction would impose a prior restraint on Napster users’ free speech.²⁹⁴ The court rejected this argument, finding that the First Amendment is coextensive with the fair use doctrine.²⁹⁵ The court also held that RIAA members did not seek to enjoin any of Napster’s fair uses, and that Napster could separate the infringing and noninfringing parts of its services in order to avoid a complete shut down.²⁹⁶ Judge Patel fur-

ther rejected Napster’s misuse of copyright defense because although Napster cited cases dealing with enlarging copyright monopolies through licensing, RIAA members never granted Napster a license to the music files being distributed over its network.²⁹⁷ Lastly, Napster’s argument that RIAA had waived an entitlement to copyright protection was rejected because the court found that RIAA did not invite “wholesale infringement when they distributed a small number of free MP3 files for promotional purposes.”²⁹⁸

4. *The District Court’s Conclusions in Napster*

The court found that, because the RIAA showed “a reasonable likelihood of success on the merits of their contributory and vicarious copyright infringement claims” against Napster, they were entitled to a presumption of irreparable harm.²⁹⁹ Furthermore, predictions about a preliminary injunction’s impact on Napster was pure speculation in comparison to the massive amount of unauthorized use of RIAA’s copyrighted works by allowing Napster to continue its operations.³⁰⁰ The court thus enjoined Napster from facilitating others in the free copying of both plaintiffs’ copyrighted works in this suit and those not yet named.³⁰¹

B. Analysis of the District Court’s Decision to Enjoin Napster’s Operation

Judge Patel’s decision “disregarded the Supreme Court’s caution that the judiciary should be reluctant to expand copyright protections without explicit legislative guidance when major technological innovations alter the market for copyrighted materials.”³⁰² Such a decision threatens manufacturers of digital technology and discourages the development and use of new kinds of In-

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 919–20 (analogizing Napster to the contributory liability of the swap meet operators selling musical recordings in *Fonovisa* who provided parking, booth space, advertising and clientele).

²⁹⁰ *Id.* at 920–21.

²⁹¹ *Id.* at 921; see also *Napster Injunction*, supra note 275, at d4.

²⁹² *Napster*, 114 F. Supp. 2d at 920–22.

²⁹³ *Id.* at 922.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 922–23.

²⁹⁷ *Id.* at 923.

²⁹⁸ *Id.* at 923–24.

²⁹⁹ *Id.* at 925.

³⁰⁰ *Id.* at 926.

³⁰¹ *Id.* at 927.

³⁰² Brief for the Consumer Elec. Ass’n, The Digital Future Coalition, and the Computer and Communications Indus. Ass’n as Amici Curiae in Support of Reversal at 3, *Napster, Inc. v. A & M Records, Inc.*, 2000 WL 1055915 (9th Cir. July 28, 2000) (Nos. 00-16401 and 00-16403) [hereinafter Brief for Appellant]; *Sony*, 464 U.S. at 431 (holding that “[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials”).

ternet technology.³⁰³ However, the primary flaw in this opinion is that the judge unconstitutionally expanded the copyright holders' monopoly over their copyrighted works, giving them control over something they do not directly control.³⁰⁴ First, Judge Patel misapplied the staple article of commerce doctrine from *Sony* because she assumed that if a technology is primarily used for copyright infringement, none of the other uses could be considered commercially significant.³⁰⁵ Under *Sony*, the technology "need merely be *capable* of substantial noninfringing uses," and a court then must consider both actual current uses and all the future "different potential uses" of the technology, not simply current actions by users of the technology.³⁰⁶ Regardless of the other Napster uses, such as sampling and time-shifting, the court held that "Napster's primary role of facilitating the unauthorized copying and distribution [of] established artists' songs renders *Sony* inapplicable."³⁰⁷ The court further disregarded the Ninth Circuit's holding in *Diamond Multimedia* that the AHRA protects the home taping of "all noncommercial copying by consumers of digital and analog musical recordings," not merely certain types of noncommercial reproductions.³⁰⁸

Next, Judge Patel found that the sharing of music where artists have authorized copying and distribution of their works through Napster "may not represent a substantial or commercially significant aspect of Napster" because it was not a key aspect of Napster's initial business plan.³⁰⁹ However, the *Sony* standard was meant to be a forward-looking flexible test, considering all of the many potential uses of the technology in order to allow it to "mature and realize future lawful uses."³¹⁰ In *Sony*, the Supreme Court found that the VCR met the "capable of substantial noninfringing use" standard because: "(a) consumers could record programming that either was not copyrighted or whose owners did not object to the recording; and (b) unauthorized time-shift recording for subsequent viewing was fair use."³¹¹ Yet, the *Sony* Court found

that only 7.3% of the programming was considered nonobjectionable, or authorized by copyright holders.³¹² Thus, imposing contributory liability on Napster would be unfair to those who appreciated time-shifting as a means to enlarge the audience for their works.³¹³ Whereas, in *Napster*, the court found that 87% of the works on Napster are copyrighted, while 13% are not.³¹⁴ The court in *Napster* disregarded the fact that the authorized copying and distribution of an artists' works as a way to expand one's audience may be substantial fair uses of these works and are far from insignificant.

Third, the court in *Napster* found that *Sony* was different because Napster "exercises continuing control over its service[,] but that was not a requirement to be proved under the *Sony* fair use doctrine."³¹⁵ The *Napster* court, on the other hand, found that Napster never exercised control over the selection and transmission of files by its users.³¹⁶ The court also held that Napster could avoid copyright liability if it modified its service to avoid the possibility of infringement, another aspect of copyright doctrine not required under *Sony*.³¹⁷ The court in *Napster* applied the staple article of commerce doctrine more strictly than the *Sony* Court intended and Judge Patel refused to accept the instruction that courts "be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests."³¹⁸ In essence, Judge Patel's opinion in *Napster* discourages innovation by Internet companies who fear copyright litigation might shut them down.

C. Finding a Solution for Napster in the Online Copyright Debate Over the Distribution of Digital Entertainment Content

For years, it has generally been opined that record companies charge inflated prices for their products, with most of the revenue ending up in

³⁰³ Brief for Appellant, *supra* note 302, at 3.

³⁰⁴ Heilemann, *supra* note 256, at 256.

³⁰⁵ *Id.* at 255; see also *Sony*, 464 U.S. at 442.

³⁰⁶ *Sony*, 464 U.S. at 442 (emphasis added).

³⁰⁷ *Napster*, 114 F. Supp. 2d at 917.

³⁰⁸ *Diamond Multimedia*, 180 F.3d at 1079 (emphasis added).

³⁰⁹ *Napster*, 114 F. Supp. 2d at 917.

³¹⁰ Brief for Appellant, *supra* note 302, at 8.

³¹¹ *Id.* at 9-10.

³¹² *Sony*, 464 U.S. at 424.

³¹³ Brief for Appellant, *supra* note 302, at 10.

³¹⁴ *Napster*, 114 F. Supp. 2d at 902-03.

³¹⁵ *Id.* at 916.

³¹⁶ *Id.* at 907.

³¹⁷ *Id.* at 915-16.

³¹⁸ *Sony*, 464 U.S. at 431.

the hands of corporate executives, as opposed to the very artists who create the copyrighted works.³¹⁹ Record companies, as the middlemen, have retained control over the distribution of these works as a type of weapon against their artists. The Internet threatens this balance of control. The recording industry holds stubbornly to the retailing model where people are actually purchasing CDs when, in reality, people are now downloading MP3s. Physical promotion and distribution of music has essentially "peaked in economic terms."³²⁰ Both the *Reimerdes* and *Napster* opinions reflect this point by masking what the judges believe protects copyright holders, while they are actually sustaining an outdated industry model in which the record and film executives, not the artists, are the main profiteers.³²¹

As the lines continue to blur between various media of communications in the digital age, the recording industry would be smart to try to learn from and work with the Napster distribution model. Online music distribution has proven to be a more efficient means of delivery to consumers, something that the record companies should be attempting to promote and not destroy.³²² This is because online distribution gives artists the chance to reach their audiences directly while recording industry companies have an opportunity to reduce their marginal costs of distribution to almost zero.³²³ An alternative to the extreme sanctions imposed against Napster might be

"recogniz[ing] the popularity of listening to music [online] while acknowledging the property rights of the recording industry."³²⁴ RIAA members would be better ceasing this seemingly endless litigation that will continue against other similar online ventures if a court order shuts down Napster.

The recurring theme throughout the *Napster* case is that even if Napster is shut down, there will always be other music trading services ready to take their place and they will be just as difficult to police.³²⁵ Although companies like Scour.com, "a Napster-like Windows program" that is a kind of "easy-to-use AOL for filesharing," has laid off most of its staff due to legal threats by the RIAA, there are other similar, but decentralized and anonymous services like Gnutella and Freenet that will be harder for the RIAA to sue.³²⁶ Gnutella will most likely be the first program people download if Napster is shut down.³²⁷ With Gnutella, once someone downloads the software, "a 'hello' message is sent to a computer that is already on the network, which forwards it to seven others, letting them know that the first computer is on board . . . [t]hey in turn, forward it to six more, which forward it to five more and so on."³²⁸ A particular request percolates through the Gnutella network and when it reaches a computer that has the file, the message percolates back to the initial requesting computer, making the original person who re-

³¹⁹ Martin Peers, *States Sue Record Firms Over CD Pricing Policies*, WALL ST. J., Aug. 9, 2000, at B7. On Aug. 8, 2000, the Attorneys General from 30 states and commonwealths filed a federal lawsuit against five record companies and three retail music chains for allegedly conspiring to fix prices of CDs, costing consumers hundreds of millions of dollars. Under a minimum advertised price ("MAP") policy established by record companies in the mid-1990s to end CD price wars, discount retailers were forced to charge a fixed price for CDs or lose millions of dollars from promotional payments from record companies. In May, the Federal Trade Commission settled with five of the major record labels who agreed to stop MAP policies for seven years, without having to admit wrongdoing. *Id.*

³²⁰ *Hearings*, *supra* note 17 (testimony of Gene Hoffman, Jr., Founder, President and CEO, EMusic.com, Inc.).

³²¹ Editorial, *Overkill on MP3*, BOSTON GLOBE, Sept. 10, 2000, at F6 [hereinafter *Overkill on MP3*]; Voegtli, *supra* note 89, at 1241 ("[I]t is not uncommon for the total earnings from derivative works to exceed movie ticket sales, and companies, like the Walt Disney Company, have successfully exploited derivative rights to generate considerable profits.").

³²² *Hearings*, *supra* note 17 (testimony of Gene Kan, Gnutella, Developer and Founder, Infrasearch, Inc.).

³²³ *Id.* (discussing the reasons artists and recording com-

panies can benefit from digital music); Gaffney, *supra* note 12, at 629 ("[T]he combination of low-cost perfect copying with electronic distributive networks such as the Internet allows for widespread dissemination of high-quality copies at very low overhead costs.").

³²⁴ *Overkill on MP3*, *supra* note 321.

³²⁵ See Heilemann, *supra* note 256, at 258 (discussing the inevitability of other online peer-to-peer file-sharing service). Napster also has demonstrated that if the file-sharing central index technology were located offshore in another country, the United States would not have the power to stop the Napster-like services from emerging. *Id.*

³²⁶ *New DivX is the MP3 of Movie Swapping: But Expects Frustrations—The Revolution Is Still in Early Beta*, TIME DIGITAL, at <http://www.time.com/time/digital/daily/0,2882,52811,00.html> (Aug. 17, 2000); see also Janelle Brown, *The Gnutella Paradox*, RED HERRING COMM., at <http://www.redherring.com/insider/2000/1002/tech-off-salon-gnutella100200-home.html> (Oct. 2, 2000) [hereinafter Brown] (discussing the popularity of Gnutella on the Internet and Gnutella's future legal situation if Napster is shut down).

³²⁷ Brown, *supra* note 326.

³²⁸ Karl Taro, *Meet the Napster*, TIME DIGITAL, at <http://www.time.com/time/magazine/articles/0,3266,55730-5,00.html> (Oct. 2, 2000).

quested the file essentially anonymous.³²⁹ The problem with Gnutella is that in order to get onto the network there needs to be other users, and in order to find a particular file there needs to be a significant number of users on board.³³⁰ Furthermore, because there is no central server, there is no technical support or hotline to give technical assistance to its users.³³¹ Lastly, the software is a "work-in-progress" and is still flawed.³³² However, it will be difficult for the RIAA to bring legal action against Gnutella because it is not restricted to MP3 file sharing.³³³ Gnutella also has no central server and because Gnutella is merely a protocol, there is no one entity responsible for its existence on the Internet and thus, no company to sue.³³⁴ Regardless, RIAA members are hinting that they are strategizing a legal attack on Gnutella.³³⁵

The best example of a compromise between the RIAA and companies that are in the gray areas of copyright law like Napster, MP3.com and Gnutella, is EMusic.com.³³⁶ EMusic.com offers the Internet's largest catalog of downloadable MP3 music available for purchase, offering over 100,000 MP3s by signed artists.³³⁷ Through licensing agreements and relationships with artists, EMusic.com sells individual tracks for ninety-nine cents and entire downloadable albums for \$8.99.³³⁸ The most attractive part of the technology is the "EMusic Unlimited" subscription service that offers unlimited MP3s for download at \$9.99 per month for a full year or \$19.99 for one month.³³⁹ Thus, under the EMusic.com model, artists are still paid royalties while consumers are offered reasonable download prices for music they enjoy.³⁴⁰ The EMusic.com model drives consumers to feel less cheated and more willing to pay. This rational solution to consumer demand would effectively put a stop to the RIAA's lock and key mentality to its music.

Recognizing the benefits of the EMusic.com

model, on October 31, 2000, Bertelsmann AG, the parent company of RIAA member BMG Entertainment and the fourth-largest music company in the U.S., struck a deal with Napster to develop a new subscription-based distribution service in exchange for an undisclosed investment in Napster.³⁴¹ Under the alliance, BMG will withdraw from the RIAA copyright infringement lawsuit against Napster "once the service has reconfigured itself to pay royalties to Bertelsmann's artists through pay-for-play subscription fees" at approximately \$4.95 a month.³⁴² However, the terms of the agreement are unclear, including how the company plans on monitoring the songs-users' downloads and how revenue will be shared with other labels that decide to join.³⁴³ The deal also came as a surprise to Sony, Universal, Warner and EMI, the four other major RIAA companies, and it is far from certain that they will commit to the endeavor.³⁴⁴ Finally, the Napster-Bertelsmann deal will not end the lawsuit filed by the RIAA against Napster and depending on the outcome of the appeal, the new partnership could be extinguished if Napster is ordered to shut down.³⁴⁵

V. CONCLUSION

Although the entertainment industry seems to be winning the initial battles in the war against the unauthorized copying and distribution of copyrighted digital music and video over the Internet, their resistance to technological change may end up costing them the war. These early victories that strengthen the law in favor of copyright holders should be seen as a temporary restraining wall until the entertainment industry accepts the new realities of technology and adjusts the way they distribute digitally copyrighted works. Although the *Reimerdes* case may be upheld on appeal for public policy reasons, the proliferation

³²⁹ *Id.*

³³⁰ *Id.* (discussing the problems with Gnutella).

³³¹ *Id.*

³³² *Id.*

³³³ See generally What is Gnutella?, at http://www.gnutella.com/news.com/information/what_is_gnutella.shtml (last visited Jan. 10, 2001) (describing how the Gnutella service and software work).

³³⁴ *Id.*

³³⁵ Brown, *supra* note 326.

³³⁶ See generally EMusic.com, at <http://www.emusic.com> (last modified Oct. 20, 2000).

³³⁷ Hearings, *supra* note 17 (testimony of Gene Hoffman, Jr., Founder, President and CEO, EMusic.com, Inc.).

³³⁸ *Id.*

³³⁹ See generally EMusic Unlimited, at <http://www.emusic.com/subscription/index.html> (last modified Nov. 18, 2000).

³⁴⁰ Hearings, *supra* note 17 (testimony of Gene Hoffman, Jr., Founder, President and CEO, EMusic.com, Inc.).

³⁴¹ David Segal, *Napster and Former Foe Plan Online Song Sales; Bertelsmann to Quit Industry Lawsuit*, THE WASHINGTON POST, Nov. 1, 2000, at A1.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

with which DeCSS has flourished over the Internet makes the decision somewhat infeasible in reality. Even if 2600.com is banned from posting or linking to DeCSS on its particular website, DeCSS will continue to exist all over the Internet. Although Napster's future does not look promising and Napster may soon be shut down by court order, the legitimacy of certain uses for online file swapping might still be upheld. However, even if Napster is shut down, its progeny are right behind them, ready to take Napster's place. Those websites may be hard to find, police and subsequently difficult to sue. While the MPAA is looking for better encryption technology and the RIAA is trying to establish its own encryption technology in order to remain competitive, these industry

groups should focus on taking advantage of the new business opportunities of digital distribution over the Internet. The more industry continues to lock up copyrights and expand monopolies over their copyrighted works, the more consumers will fight back by using online distribution outlets like Napster. In the end, it is up to the entertainment industry to decide whether or not they want to work with such new technologies that are embraced by the American public. If they don't find a resolution soon or work toward furthering these innovative technologies, the Shawn Fannings and Jon Johansens of this world will take control of the Internet and essentially make copyright laws moot.

